IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.730 OF 2000

The Commissioner of Income Tax,
Mumbai City IV, Mumbai. ..Appellant.

V/s.

Pudumjee Agro Industries Ltd.,
Jatial Chambers, 60, Dr.V.E.
Gandhi Marg, Mumbai - 400 023. ..Respondent.

Mr.Ahok Kotangale, Advocate for appellant.

Mr.P.J.Pardiwalla, Advocate with B.D.Damodar i/b. Kanga & Co. for respondent.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 25TH OCTOBER, 2005.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. This appeal filed by the revenue under section 260A of the Income Tax Act, 1961 ('the Act' for short) was admitted on 7/1/2002 on the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case the Tribunal was right in law in

confirming the findings of the Commissioner (Appeals) in directing the assessing officer to allow deduction under section 32AB to the tune of Rs.88,44,445/- on the basis of profits earned by the assessee from its paper division alone, without considering the loss of the Agro Unit."

2. The assessment year relevant for the present appeal is AY 1990-91.

3. The respondent (hereinafter referred to as 'the assessee') is a public limited company carrying on business in two separate units namely paper division and agro division. Both these units of the assessee are 'eligible business' within the meaning of section 32AB of the Act.

4. It is not in dispute that the assessee had maintained separate accounts for the above two units and a separate profit and loss account and balance sheet for each of the unit were drawn up in accordance with part II and III of schedule VI of the Companies Act, 1956 based on the separate accounts maintained by the assessee.

5. During the previous year relevant to the assessment year, 1990-91, net profits of the paper division after making adjustments computed under clause (i) to (vi) of sub-clause (3) of Section 32AB came to Rs.4,42,22,227/-. Similarly, the Agro division, after making the necessary adjustments, disclosed a loss of Rs.97,80,642/-. During the previous year relevant to the assessment year 1990-91, the assessee had spent a sum of Rs.1.42 crores for purchase of new machineries for the paper division. The assessee in its return of income had claimed deduction under section 32AB in respect of the amounts utilised on acquisition of plant and machinery. As the deduction under section 32AB is available on the amount spent on new plant and machinery or 20% of the profits of the eligible business whichever is lower, the assessee had restricted its claim to Rs.88,44,445/- (being 20% of Rs.4,42,22,227/-) and had not claimed entire expenditure of Rs.1.42 crores incurred on acquisition of plant and machinery.

6. The assessing officer held that the limit of 20% has to be arrived at after setting of the loss of agro division against the profits of the paper division and accordingly, restricted deduction under section 32AB to Rs.68,88,353/- being 20% of Rs.3,44,41,765/-

[Rs.4,42,22,227 - Rs.97,80,462].

7. On appeal filed by the assessee, the Commissioner of Income Tax (Appeals) relying upon the decision of the Apex Court in the case of **C.I.T. V/s. Canara Workshop Pvt.Ltd.** reported in **161 I.T.R. 320** held that as the assessee was maintaining accounts for both the units separately, the assessing officer was not justified in setting off the loss of agro division against the profits of the paper division while arriving at the limit of 20% under section 32AB of the Act.

8. On further appeal filed by the Revenue, the I.T.A.T. confirmed the order of C.I.T.(A) and dismissed the appeal of the revenue. Hence the present appeal.

9. Mr.Kotangale, learned counsel for the revenue submitted that under section 32AB(3)(a) of the Act, determination of the profits is required to be made in accordance with part II & III of the VI schedule to the Companies Act, 1956 after taking into account all the activities of the assessee governed by the Companies Act. He submitted that the profit and loss account required to be drawn up by a company must necessarily

reflect all the income and all the expenditure incurred by the company in that year. Accordingly, the counsel for the revenue submitted that where there are two eligible units and one unit makes profit and another unit makes loss, then the deduction under section 32AB of the Act has to be from the profits of the eligible business arrived at after setting off the loss suffered by the other eligible business viz. agro unit.

10. Section 32AB of the Act relevant for the present appeal, as it stood at the relevant time reads as follows :-

> 32AB. (1) Subject to the other provisions of this section, where an assessee, whose total includes income chargeable to tax under the head "Profits and gains of business or profession", has, out of such income, -
>
> (a) deposited any amount in an account (hereafter in this section referred to as deposit account) maintained by him with the Development Bank before the expiry of six months from the end of the previous year or before furnishing the return of his income, whichever is earlier: or
>
> (b) utilised any amount during the previous year for the purchase of any new ship, new aircraft, new machinery or plant, without depositing any amount in the deposit account under clause (a),
>
> in accordance with, and for the purposes specified in, a scheme (hereafter in this section referred to as the scheme) to be framed by the Central Government, or if the assessee is carrying on the

business of growing and manufacturing tea in India, to be approved in this behalf by the Tea Board, the assessee shall be allowed a deduction (such deduction being allowed before the loss, if any, brought forward from earlier years is set off under section 72) of -

(i) a sum equal to the amount or the aggregate of the amounts, so deposited and any amount so utilised ; or

(ii) a sum equal to twenty per cent of the profits of [eligible] business or profession as computed in the accounts of the assessee audited in accordance with sub-section (5),

whichever is less :

[Provided that where such assesses is a firm, or any association of persons or any body of individuals, the deduction under this section shall not be allowed in the computation of the income of any partner, or as the case may be, any member of such firm, association of persons or body of individuals.]

(2) For the purposes of this section, -

[(i) "eligible business or profession" shall mean business or profession, other than-

(a) the business of construction, manufacture or production of any article or thing specified in the list in the Eleventh Schedule carried on by an industrial undertaking, which is not a small-scale industrial undertaking as defined in section 80HHA ;

(b) the business of leasing or hiring of machinery or plant to an industrial undertaking, other than a small-scale industrial undertaking as defined in section 80HHA, engaged in the business of construction, manufacture or production of any article or thing specified in the list in the Eleventh Schedule ;

(ii) ----------

(iii) ----------

(iv) ---------

(3) [The profits of eligible business of profession of an assessee for the purposes of sub-section (1) shall, -

(a) in a case where separate accounts in respect of such eligible business or profession are maintained,] be an amount arrived at after deducting an amount equal to the depreciation computed in accordance with the provisions of sub-section (1) of section 32 from the amounts of profits computed in accordance with the requirements of Parts II and III of the [Sixth Schedule] to the Companies Act, 1956 (1 of 1956) [as increased by the aggregate of-

(i) the amount of depreciation ;

(ii) the amount of income-tax paid or payable, and provision therefor ;

(iii) the amount of surtax paid or payable under the Companies (Profits) Surtax Act, 1964 (7 of 1964) ;

(iv) the amounts carried to any reserves, by whatever name called ;

(v) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities ;

(vi) the amount by way of provision for loss of subsidiary companies ; and

(vii) the amount or amounts of dividends paid or proposed,

if any debited to the profit and loss account; and as reduced by any amount or amounts withdrawn from reserves or provisions, if such amounts are credited to

the profit and loss account ; [and]

(b) in a case where such separate accounts are not maintained or are not available, be such amount which bears to the total profits of the business or profession of the assessee after allowing depreciation in accordance with the provisions of sub-section (1) of section 32, the same proportion as the total sales, turnover or gross receipts of the eligible business or profession bear to the total sales, turnover or gross receipt of the business or profession carried on by the assessee.

(4) ----------

(5) The deduction under sub-section (1) shall not be admissible unless the accounts of the business or profession of the assessee for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant as defined in the *Explanation* below sub-section (2) of section 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant ;

Provided that in a case where the assessee is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this sub-section if such assessee gets the accounts of such business or profession audited under such law and furnishes the report of the audit as required under such other law and a further report in the form prescribed under this sub-section.

11. At the relevant time, deduction under section 32AB(1) of the Act was available to an assessee who had income chargeable under the head "Profit and gains of

business or profession" and out of the said business income, the assessee had either deposited certain amount with the industrial bank of India or utilised the business income for acquisition of certain assets before the expiry of 6 months from the end of the previous year or before furnishing the return of income whichever is earlier. On fulfilment of the above conditions, the assessee was entitled to deduction of a sum equal to the amount deposited / utilised or a sum equal to 20% of the profits of eligible business or profession computed under section 32AB(3), whichever is lower.

12. Section 32AB (2) of the Act inter alia sets out the meaning of the word "eligible business or profession" used in section 32 AB(1) and Section 32AB (3) of the Act sets out separate methods for determining the profits of eligible business or profession in cases where the accounts of the eligible business are maintained separately and in cases where the accounts of the eligible business are not maintained separately. Section 32AB (3) (a) deals with determination of the profits of the eligible business or profession where the accounts are maintained separately and Section 32AB (3)(b) deals with the determination of the profits of eligible business where

accounts are not maintained separately.

13. According to Mr.Pardiwalla, learned counsel for the assessee, the contention of the revenue that the profits of an eligible business under section 32AB (3) (a) of the Act, has to be determined after setting off the loss suffered by the loss making eligible unit is erroneous, because, section 32AB(3)(a) of the Act specifically provides that in cases where separate accounts of the eligible business or profession are maintained, the profits of eligible business of the assessee for the purposes of section 32AB(1) shall be the amount arrived at after deducting an amount equal to the depreciation computed in accordance with the provisions of section 32(1) from the profits computed in accordance with the requirements of Part II and III of the sixth schedule to the Companies Act, 1956 and the resultant sum is to be further increased by the aggregate of the items (i) to (vii) specified in section 32AB (3)(a) and further reduced by the amounts withdrawn from reserves or provisions, if such amounts are credited to the profit and loss account. Unlike in section 32AB (3)(b) where the profits of the eligible business are required to be determined on pro rata basis, in section 32AB (3) (a) there is no provision for setting off the loss suffered by the eligible unit.

Accordingly, it was submitted that the authorities below were justified in rejecting the contention of the revenue.

14. In the present case, it is an admitted fact that the assessee had maintained separate accounts in respect of both the eligible business and, therefore, deduction under section 32AB (1) at 20% of the profits of the paper division has to be determined in the manner prescribed under section 32AB (3)(a) of the Act. Determination of the profits of the eligible business under section 32AB (3)(a) involves the following steps:-

(i) the profits of the eligible business has to be computed in accordance with the requirements of Parts II & III of the Sixth Schedule to the Companies Act, 1956;

(ii) from the profits so computed, an amount equal to the depreciation computed in accordance with the provisions of section 32(1) of the Act is to be deducted;

(iii) the resultant sum arrived at, is to be further increased by the aggregate of the

items (i) to (vii) specified in section section 32AB (3)(a) of the Act;

(iv) the resultant sum arrived at is to be further reduced by any amount withdrawn from reserves or provisions, if such amounts are credited to the profit and loss account;

(v) the amount so arrived at is the profits of the eligible business and 20% of that amount is allowable under section 32 AB (1) of the Act;

Thus, section 32AB (3)(a) of the Act deals with each eligible business separately and the profits of each eligible business has to be determined by increasing or decreasing the profits of each eligible business computed separately under the provisions of the Companies Act, 1956. The increases and decreases permitted under section 32AB (3)(a) do not comtemplate setting off the loss of another eligible unit. Therefore, in the absence of any provision for setting off the loss suffered by one eligible business from the profits of another eligible business for the purpose of deduction under section 32AB (1) of the Act, the Tribunal was justified in upholding the claim of the

assessee.

15. There can be no dispute that where an assessee carried on an eligible business and a non eligible business and the assessee had maintained accounts of the above two businesses separately and there was profit in the eligible business and loss in the non eligible business, then for the purpose of deduction under section 32AB (1) of the Act, the profits of the eligible business alone would be considered without deducting therefrom the loss suffered in the non eligible business. If the loss suffered in the non eligible business is to be ignored for determining the profits of the eligible business, then, there is no reason as to why the loss suffered by one eligible business should not be ignored from the profits of the other eligible business under section 32 AB (3)(a) of the Act. In other words, where the accounts of each of the eligible business are maintained separately, then the profits of each of the eligible businesses for the purpose of deduction under section 32AB (1) has to be determined separately under section 32AB (3)(a) of the Act and merely because there is loss suffered by one eligible business, it cannot be said that the said loss is to be set off from the profits of the other eligible business.

16. It is pertinent to note that by Finance Act, 1989 the concept of eligible business and determination of profits of eligible business whose accounts have been maintained separately have been done away with prospectively with effect from 1/4/1991. As a result from 1/4/1991, maintaining separate accounts has no relevance for the purpose of deduction under section 32AB (1) of the Act and what is relevant from 1/4/1991 is the profits of business or profession of an assessee and not the profits of each business of the assessee. Therefore, for the AY 90-91 with which we are concerned in this appeal, the deduction under section 32AB (1) of the Act in respect of the profits of the paper division has to be determined from the profits of the paper division as determined under section 32AB (3)(a) of the Act without setting off the loss suffered by the agro division.

17. It is true that under Section 70 of the Act, while determining the total income chargeable to tax under the head "profits and gains of business", the loss from the agro division has to be set off against the profits of the paper division. However, the said set off is not relevant for the purpose of computing 20% deduction under Section 32AB(1) of the Act, in view

of the specific provisions contained in section 32AB(3)(a) of the Act for determining the profits of each eligible business of the assessee.

18. We make it clear that in the present case, we are concerned with the provisions of section 32AB as it stood prior to the amendment of section 32AB with effect from 1/4/1991. In the present case, it is not in dispute that the assessee has complied with all the requirements contained in section 32AB of the Act and the only dispute is with reference to the setting off the loss of the agro unit from the profits of the paper unit for the purpose of deduction under section 32 AB(1) of the Act. As per section 32AB of the Act as it stood at the relevant time, in our opinion, deduction @ 20% from the profits of the paper division had to be determined under Section 32AB (3)(a) of the Act without setting off the loss suffered by the agro division.

19. In the result, we see no merit in the appeal. Accordingly, we answer the question in the affirmative i.e. in favour of the assessee and against the revenue.

20. The appeal is accordingly dismissed with no order as to costs.

(V.C. DAGA,J.)

(J.P. DEVADHAR, J.)